Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

CASE NO. 78-1801

THE STATE OF FLORIDA,

Petitioner,

vs.

JACK MULLINS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF PETITIONER ON JURISDICTION

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THE STATE OF FLORIDA,

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JACK MULLINS,

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ON PETITION FOR WRIT OF CERTIORARI
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REPLY BRIEF OF PETITIONER ON JURISDICTION

I.

OPINIONS OF THE COURT BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported at Mullins v. State, 353 So.2d 605 (Fla. 3d DCA 1978), D.Ct. Case No. 77-1058,

opinion filed December 13, 1977, rehearing denied January 16, 1978. The opinion of the Supreme Court of Florida, reversing the District Court is reported at Mullins v. State, 366 So.2d 1162 (Fla. 1979), S.Ct. Case No. 53,394, opinion filed December 7, 1978, rehearing denied February 22, 1979. Both the decision of the Supreme Court of Florida and the District Court have been appended in conformance with Supreme Court Rule 23. There are no official reports for citation of these decisions.

Attached hereto are Petitioner's Composite Exhibits "A," "B" and "C," which consist of a refiled information; Petitioner's Motion for a Stay in the Supreme Court of Florida and Order Denying Stay, respectively. The references herein to the Petitioner's Appendix designated by the symbol (A) followed by an arabic number, are references to the Petitioner's Appendix attached to its

initial brief herein, which was filed on or about June 1, 1979.

II.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE, IN DEROGATION OF THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

III.

REASONS FOR GRANTING THE WRIT

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE, IN DEROGATION OF THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The trial court below found that the threshhold contact between the arresting officer, Frazer and the Petitioner was "reasonable." Record-on-Appeal at 15. The sole question presented to the state courts, in the opinions previously submitted by the Petitioner at Mullins v. State, 353 So.2d 605 (Fla. 3d DCA 1978) [A1-A3] and Mullins v. State, 366 So.2d 1162 (Fla. 1978), [A4-A11] was stated by the Respondent, to wit:

"WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE, IN DEROGATION OF THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION."

Upon the foregoing facts, the District Court of Appeal of Florida, Third District, rejected the Respondent's contention of error, holding that:

"We hold that no unreasonable search appears in this record and that the fact that the police officer stopped the appellant to speak to him, under the circumstances of this case, was not an infringement of defendant's Fourth or Fourteenth Amendment rights. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889

(1968); and Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966). See also Wigfall v. State, 323 So.2d 587 (Fla. 3d DCA 1975); and cf. U.S. v. Allen, 472 F.2d 145 (5th Cir. 1973)."

353 So.2d, supra, at 606.

The District Court rejected the construction of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), urged by the Respondent relying upon Vollmer v. State, 337 So.2d 1024 (Fla. 2d DCA 1976).

The Supreme Court of Florida accepted jurisdiction upon the Respondent's Petition for a Writ of Certiorari pursuant to Rule 9.030(a)(2)(A)(iii) Florida Rules of Appellate Procedure (1978), based upon the conflict between the Third District Court's opinion in Mullins v. State and

Vollmer v. State, supra, at 366 So.2d at 1162 [A5]. The Supreme Court of Florida adopted the contrary construction of Terry v. Ohio, announced in Vollmer v. State, supra. [A23-A24] and the application of the Fourth and Fourteenth Amendments of the United States Constitution in Coladonato v. State, 348 So.2d 326 (Fla. 1977) [A12-A19]. 366 So.2d at 1163 [A6]. The Florida Supreme Court reversed the Third District Court of Appeal and rejected the opinions of Justices Harlan and White to the contrary in Terry v. Ohio, 392 U.S. at pp. 32-34; holding that under the provisions of the Fourth and Fourteenth Amendments that the approach at 3:20 o'clock a.m., by the arresting officers unconstitutional, per se and that a police officer is never authorized to approach and talk to an individual on the public street unless the

police officer can articulate a basis for a belief that a crime had, will be, or is currently being committed. See, 366 So.2d at 1163 [A6-A11]. The Florida Supreme Court reversed both the trier of fact and the Florida Third District of Appeal based upon an erroneous view of the constitutional protection afforded by the Fourth and Fourteenth Amendments to the United States Constitution and has abrogated common sense and the practical exigencies of law enforcement in an urban area. See, Adams v. Williams, 407 U.S. 143, at 145-146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Petitioner submits that application of the requirements of the Fourth and Fourteenth Amendments in Mullins v. State, 366 So.2d 1162 (Fla. 1979) [A4-A11] is clearly erroneous and follows an errant line of decisions in

Coladonato v. State, 348 So.2d 326 (Fla. 1977) [A12-A19] and Vollmer v. State, 337 So.2d 1024 (Fla. 2d DCA 1976) [A20-A26].

The Respondent in his "Memorandum Opposing Certiorari" and in his "Reply to Petitioner's 'Response to Memorandum Opposing Certiorari,'" does not dispute the foregoing analysis, but alleges instead that the matter herein is moot inasmuch as "The State of Florida" announced a nol prosequi of the matter herein on July 9, 1979. The hearing on July 9, 1979, was conducted without notice to the Office of the Attorney General. The Assistant State Attorney who announced the nol prosequi, and the trial court were unaware of the appellate proceedings herein. The "State of Florida" has, of course, been represented by statute in this matter since the Respondent's conviction on April 14, 1977, by the Office

of the Attorney General. See, §16.01 Fla. Stat. (1975).

On August 2, 1979, the Assistant State Attorney who entered the nol prosequi, refiled the charges herein against the Respondent. See, Petitioner's Exhibit A, attached hereto. On August 17, 1979, in what it knew would be futile effort in the Supreme Court of Florida, the Petitioner sought either a stay pending review, or a thirty (30) day stay to enable the Petitioner to seek a stay in this Court. See, Petitioner's Exhibit B, attached hereto. On August 29, 1979, the Supreme Court of Florida denied the Petitioner's Motion in its entirety. Petitioner's Exhibit C, attached hereto. Nevertheless, the Respondent's claim of mootness is substantially irrelevant to the proper exercise of this Court's jurisdiction. See, Pennsylvania v.

Mims, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed. 2d 331 (1977). The Petitioner has a right to seek to uphold its conviction herein and the Respondent's claim of mootness should be rejected. Pennsylvania v. Mims, 98 S.Ct. at 332, n.3.

The Respondent also contends as his only response to jurisdiction herein that the Petitioner relies "substantially" upon Brown v. Texas, ___U.S.___, 99 S.Ct. 2637 (1979). To the contrary, the Petitioner only indicated that the cause herein substantially presents an additionally companion case to the issues presented in Michigan v. DeFillippo, ___U.S.___99 S.Ct. 2627 (1979) and Brown v. Texas, supra. The Supreme Court of Florida has imposed an erroneous rule herein under the Fourth and Fourteenth Amendments that a police officer is never authorized to contact an individual on the public street unless the

police can articulate a basis for a belief that a crime had, will be, or is currently being committed. 366 So.2d, at 1163. Under the guise of the prohibitions, Fourth Amendment to the United States Constitution, the Florida Supreme Court has erroneously abrogated the common right of a law enforcement officer to engage a citizen on a public street in voluntary conversation. See, Terry v. Ohio, 392 U.S. at pp. 26, 19 n.16; United States v. Wylie, 569 F.2d 62, at 67 (D.C.Cir. 1977); Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966); Wigfall v. State, 323 So.2d 587 (Fla. 3d DCA 1975); People v. DeBour, 386 N.Y.S. 2d 375 (N.Y.App. 1976); see, also, Adams v. Williams, 407 U.S. at 145-146; United States v. Elmore, 595 F.2d 1036 (5th Cir. 1979), (approving United States v. Wylie, supra); Husted v. State, 370 So.2d 853, at 854 n.1 (Fla. 3d DCA 1979), (noting with approval United States v. Wylie, supra).

IV.

CONCLUSION

In the case at bar, consistent with the mandate of Terry v. Ohio, supra, there is no testimony that the Respondent did anything other than to voluntarily cooperate with the officer and voluntarily provide the requested identification. Nor is there any testimony that the Respondent expressed a desire to refuse to cooperate and go on his way. The Petitioner submits that in the circumstances of the case at bar, the initial transaction herein was not prohibited by the Fourth and Fourteenth Amendments but was a mere "contact" between a police officer in a position that he had a right to be in and a citizen on the street. There is no constitutional impact per se created by a police officer addressing questions to a person on the

street at 3:20 o'clock a.m. in a residential area. See, Terry v. Ohio; Adams v. Williams; Wilson v. Porter; Wigfall v. State, supra. The immediate foregoing conclusion is further supported by examining the recent decision in Delaware v. Prouse, ___U.S.___, 99 S.Ct. 1391, at 1401 (1979), wherein the court approved police stops of all vehicles at certain times as opposed to random stops. Consistent with Adams; Terry; Porter and Delaware v. Prouse, supra, it is undisputed in the case at bar that Officer Frazer stopped all bicyclists at 3:20 a.m. on November 29, 1976, on Opa Locka Boulevard in Hialeah, Florida. The fact of Officer Frazer's initial encounter with the Respondent was not an unreasonable invasion, per se of the Respondent's constitutional rights as the Florida Supreme Court contends.

Officer Frazer's actions without show of force or authority was the most reasonable course of action in the light of the circumstances known to him and his training and experience. See, Adams v. Williams; Wilson v. Porter, supra.

Where, as in the case at bar, the state court has clearly construed and relied upon the prohibitions of the Fourth Amendment, this Court has jurisdiction. See, Orr v. Orr, ___U.S.___, 99 S.Ct. 1102, at 1109-1111 (1979). This Honorable Court should assume jurisdiction and correct the constitutional error herein by reinstating the decision of the Third District Court of Appeal of Florida and the trier of fact below. See, Terry v. Ohio, supra.

RESPECTFULLY SUBMITTED, at Miami, Dade County, Florida, on this _____ day of September, 1979.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General
Suite 820
401 N.W. 2nd Avenue
Miami, Florida 33128

(305) 377-5441

V.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the foregoing Reply Brief of Petitioner were caused to be served by United States mail first-class delivery, upon Bennett H. Brummer, Public Defender, Counsel for Respondent, 1351 N.W. 12th Street, Miami, Florida, 33125, on this ____day of September, 1979.

CALVIN L. FOX, Esquire
Assistant Attorney General

PETITIONER'S EXHIBITS

IN THE CIRCUIT COU OF THE ELEVENTH JUDICIAL . .RCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

SPRING Term, 19 79

AUG 3 '79 76-10226
RICHARD P. BRINKER
CLERK

THE STATE OF FLORIDA,
vs.
JACK BENTLEY MULLINS

INFORMATION FOR
UNLAWFUL POSSESSION OF CANNABIS
893.13 Fel.

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

I, NEIL KARADBIL, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, on the authority of JANET RENO, State Attorney, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that

JACK BENTLEY MULLINS

on the 29th day of November, 19 76, in the County and State aforesaid, did unlawfully and feloniously have in his actual or constructive possession a controlled substance, to-wit: CANNABIS, meaning all parts of the plant Cannabis Sativa, including all varieties thereof, whether growing or not; the seeds thereof, the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin, in an amount greater than five (5) grams, in violation of 893.13 Florida Statutes,

STATE OF FLORIDA }
COUNTY OF DADE } SS.

I HEREBY CERTIFY that this instrument is a true and correct copy as shown by files and records in my office. WITNESS MY HAND and official seal this
AUG 17 1979
RICHARD P. BRINKER
Clerk Circuit Court
By Susan Tippe D.C.

NK:nla
8-1-79
REFILE 76-10226
J/Stettin

Petitioner's Exhibit A

201.01-05

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

STATE OF FLORIDA:
COUNTY OF DADE:

Personally appeared before me, NEIL KARADBIL, Assistant State Attorney for the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that this prosecution is instituted in good faith and certifies that the State Attorney of the Eleventh Judicial Circuit of Florida has received testimony under oath from the material witness or witnesses for the offense, and the allegations as set forth in the foregoing Information, if true, would constitute the offense therein charged.

Assistant State Attorney

Assistant State Attorney
Eleventh Judicial Circuit of Florida

Sworn to and subscribed before me this 2 day of August, 19 79

CIRCUIT & COUNTY COURTS CLERK IN GOD WE TRUST Dade County, Florida

Richard P. Brinker, Clerk
Circuit Court of the Eleventh
Judicial Circuit of Florida, in
and for Dade County

By Thomas V. Campbell D.C.

CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY

THE STATE OF FLORIDA
vs.
JACK BENTLEY MULLINS

INFORMATION FOR
UNLAWFUL POSSESSION OF CANNABIS

IN THE SUPREME COURT OF FLORIDA

CASE NO. 53,394

JACK MULLINS, :
Petitioner, :
vs. : MOTION TO WITHDRAW MANDATE
THE STATE OF FLORIDA, :
Respondent. :

COMES NOW, the Respondent, THE STATE OF FLORIDA, by and through its undersigned counsel and moves this Honorable Court to withdraw and stay the mandate of this Honorable Court and as grounds therefore shows:

1. That on June 1, 1979, the State of Florida filed its application for a Writ of Certiorari in the United States Supreme Court with respect to the above referenced case.

2. That on July 27, 1979, the United States Supreme Court, having made a preliminary determination that there is jurisdiction, issued its order requiring the Petitioner, Jack Mullins, to reply to the Respondent's Petition for a Writ of Certiorari. See, Respondent's Exhibit A.

3. That the Petitioner has sought to have the matter herein discharged predicated upon the Mandate of this Honorable Court. See, Respondent's Exhibit B.

4. That on August 2, 1979, the State Attorney refiled the information against the Petitioner in this matter. Exhibit C.

5. That there is a substantial likelihood that the jurisdiction will be accepted by the Supreme Court of the United

Petitioner's Exhibit B

States and there is a substantial likelihood that the Respondent will be successful on the merits. The likelihood of harm to the right of the Respondent to uphold its conviction is great because there are no remedial aspects to this matter, if in fact, the cause herein is discharged as moot. See, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); see, also, Mullins v. State, 353 So.2d 605 (Fla. 3d DCA 1978), (citing Terry v. Ohio, supra).

WHEREFORE, the Respondent, THE STATE OF FLORIDA, respectfully requests that this Honorable Court grant a Stay Pending Review in the United States Supreme Court, or in the alternative, that this Honorable Court Stay its Mandate for a period of thirty (30) days in order that the Respondent may seek a Stay Pending Review in the United States Supreme Court.

RESPECTFULLY SUBMITTED, on this 17th day of August, 1979, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General
Suite 820
401 N.W. 2nd Avenue
Miami, Florida 33128

(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Withdraw Mandate, was caused to be mailed to Thomas G. Murray, Esquire, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida, 33125, on this 17th day of August, 1979.

CALVIN L. FOX, Esquire
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, AUGUST 29, 1979

JACK MULLINS,	**	
Petitioner,	**	
v.	**	CASE NO. 53,394
STATE OF FLORIDA,	**	
Respondent.	**	

** ** ** ** ** ** ** ** ** **

Upon consideration of Respondent's Motion to withdraw mandate, said Motion is hereby denied.

I.

DOCKETED Attorney General

RECEIVED
SEP 7 1979
ATTORNEY GENERAL
MIAMI OFFICE

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

H
cc: Calvin L. Fox, Esquire
Thomas G. Murray, Esquire

Petitioner's Exhibit C